No. 94-1124

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

R.R. HENSLER,

*Petitioner,*

v.

CITY OF GLENDALE,

*Respondent.*

**On Petition for Writ of Certiorari to the California Supreme Court**

## THE NATIONAL ASSOCIATION OF HOME BUILDERS' MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GLEN FRANKLIN KOONTZ
1201 Fifteenth Street, N.W..
Washington, D.C. 20005
(202) 822-0359

*Counsel for Amicus Curiae The National Association of Home Builders*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1994

---

No. 94-1124

---

R.R. HENSLER,

Petitioner,

v.

CITY OF GLENDALE,

Respondent.

---

On Petition for Writ of Certiorari
To The California Supreme Court

---

**THE NATIONAL ASSOCIATION OF HOME BUILDERS' MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE**

---

The National Association of Home Builders ("NAHB") moves this Court for leave to file this accompanying brief amicus curiae in support of petitioner. The NAHB has received the written consent of petitioner and has filed the letter of consent with the Clerk of this Court. The respondent City of Glendale has declined NAHB's request for consent to file a brief in support of the Petition.

## INTEREST OF THE AMICUS CURIAE

The NAHB represents 180,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The NAHB has been before this Court either as an amicus curiae in support of, or as of counsel on behalf of, the property owner in prior "takings" cases involving governments' land use decisions. Dolan v. City of Tigard, 114 S.Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992); Yee v. City of Escondido, 112 S.Ct. 1522 (1992); Nollan v. California Coastal Commn., 483 U.S. 825 (1987);[1] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); Williamson County Regional Planning Commission v.

---

[1]The NAHB brief was cited approvingly in this Court's Nollan opinion, 483 U.S. at 840.

Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980).

The just compensation clause serves as a vital shield against oppressive governmental land use regulation. It is of paramount importance to this amicus and its members. The actual, as opposed to merely theoretical, availability of an appropriate constitutional remedy for the governmental action that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with overreaching governmental requirements that fail to substantially advance legitimate governmental interests. In this action, the California Supreme Court has erected a senseless procedural roadblock to property owners presenting federal Fifth Amendment claims which will have the effect of preventing the pursuit of these claims. In so doing, the California Supreme Court has so departed from this Court's prior takings jurisprudence that this Court's intervention is necessary.

The NAHB's interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on constitutional guarantees. As Justice Brandeis insightfully admonished:

> Experience should teach us to be most on our guard to protect liberty when government's purposes are

> beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[2]

The NAHB sincerely believes that the accompanying brief will assist the Court in making its decision whether to grant plenary review of the issues presented in the Petition. The NAHB's concerns are much broader than those of petitioner since its members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land. The vast majority of these decisions come from local governments and, as pointed out in the accompanying brief, some of these decisions do not respect the constitutionally protected property rights of individuals. While petitioner focuses his arguments on the harm the City of Glendale inflicts on his concerns, the NAHB's brief addressess the broader public policy reasons why plenary review should be granted.

---

[2]Olmstead v. United States, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting).

For the above reasons, this Motion should be granted.

Respectfully submitted,

/s/ Glen Franklin Koontz
Glen Franklin Koontz

1201 Fifteenth Street, N.W.
Washington, D.C. 20005
202-822-0359

Counsel for Amicus Curiae,
The National Association of
Home Builders

January 20, 1995

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF THE AMICUS CURIAE | 1 |
| SUMMARY OF THE REASONS FOR GRANTING THE WRIT | 1 |
| REASONS FOR GRANTING THE WRIT | 1 |
| CONCLUSION | 5 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **Cases** | |
| First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 264 (1981) | 1,2,4 |
| Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264 (1981) | 1 |
| Hurley v. Kincaid, 285 U.S. 95 (1932) | 1 |
| Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992) | 1,4 |
| Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) | 1 |
| Nollan v. California Coastal Commission, 483 U.S. 825 (1987) | 1 |
| Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978) | 5 |
| Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) | 5 |

| | Page |
|---|---|
| United States v. Jones, 109 U.S. 513 (1893) | 2 |
| Watson v. Memphis, 373 U.S. 526 (1963) | 5 |
| Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) | 1,4 |


**United States Constitution**


| | |
|---|---|
| Amendment Five | passim |

## INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is set forth in the preceding motion for leave to file this brief.

## SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The California Supreme Court's decision constructs a senseless procedural roadblock in the paths of property owners seeking to enforce their federal Fifth Amendment rights. This decision so radically departs from this Court's prior takings jurisprudence that this Court's intervention is necessary so as to ensure the proper, fair and consistent administration of federal Fifth Amendment rights in the State of California.

## REASONS FOR GRANTING THE WRIT

The Fifth Amendment necessarily presumes that public property may be lawfully appropriated by government for public use. See Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886, 2890 (1992); Nollan v. California Coastal Commn., 483 U.S. 825, 831-32 (1987); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-315 (1987); Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 194 (1985); Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 297, n. 40 (1981); Hurley v. Kincaid, 285 U.S. 95, 104 (1932); Monongahela Navigation Co. v. United States, 148 U.S. 312, 336 (1893);

United States v. Jones, 109 U.S. 513, 518 (1883). The Fifth Amendment is clearly "designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." First English, 482 U.S. at 315. Thus, given the clarity of this Court's jurisprudence with respect to this issue, the California Supreme Court's requirement that a property owner challenge the validity of a city ordinance before seeking compensation for an inverse condemnation is inexplicable.[1]

The petitioner filed his action pursuant to, inter alia, the United States Constitution, Amendment Five, seeking damages from the City of Glendale ("City") due to a regulatory taking of approximately 40% of his property.[2] Petitioner did not challenge the validity of the City's actions; rather, petitioner conceded lawfullness.[3] In so doing, petitioner proceeded exactly as did David Lucas.[4] The California Supreme Court, however, denied petitioner's claim on the basis that petitioner failed to challenge the validity of the City's ordinance. As stated in the opinion:

---

[1]See Petition for Writ of Certiorari, Appendix A at A31-32.

[2]See Petition for Writ of Certiorari at 3-4. The value of this portion of petitioner's property is approximately ten million dollars ($10,000,000.00). Petition for Writ of Certiorari, Appendix A at A20, fn. 8.

[3]Id.

[4]See Lucas, 112 S.Ct. at 2890.

> The gravamen of plaintiff's cause of action is therefore a claim that the Glendale ordinance is invalid on its face or as applied . . . Plaintiff cannot transform the action into one which does not challenge the validity of the ordinance, regulations, and administrative actions by acquiescing in the taking, assuming the validity of those actions, and seeking only damages.[5]

This decision erects a senseless procedural roadblock in petitioner's path.[6] More importantly, it is likely to seriously erode the constitutional protections afforded by the Fifth Amendment to the citizens of California. Indeed, it defies common sense.

The California Supreme Court's reasoning is as suspect as its result. First, the California Supreme Court claims--without any supporting authority--that a property owner, prior to asserting a federal Fifth Amendment claim, must first:

> [A]fford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction

---

[5] See Petition for Writ of Certiorari, Appendix A at A31-32 (emphasis added).

[6] A roadblock which is fatal to petitioner's case since the statute of limitations for challenging the City's ordinance is 120 days. Presumably, this is why the City was so eager to claim that petitioner was obligated to challenge the ordinance's validity. It is not clear why the California Supreme Court would countenance such an argument.

> once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking.[7]

Presumably, the California Supreme Court gleaned this idea from this Court's First English and Lucas decisions.[8] These decisions do not, however, support the California Supreme Court's holding. Indeed, contrary to the California Supreme Court's claim, these decisions upon which petitioner relied "do . . . support his thesis that the only precondition to a suit for compensation is administrative application of the ordinance restricting development of his property."[9] See also Williamson County, 473 U.S. at 186.

Second, the California Supreme Court arrogantly proclaims--again without any supporting authority--that the "procedural requirements to which plaintiff objects do no more than ensure to the state its right to a prepayment judicial determination that the ordinance or regulation is excessive and will constitute a taking . . . ."[10] The NAHB respectfully submits that states do not have "rights"; rather, individuals have rights. Indeed, a careful examination of the United States Constitution fails to uncover any instance of the granting of "rights" to a government. Assuming arguendo,

---

[7]See Petition for Writ of Certiorari, Appendix A at A12.

[8]See Petition for Writ of Certiorari, Appendix A at A8-10.

[9]See Petition for Writ of Certiorari, Appendix A at A10.

[10]See Petition for Writ of Certiorari, Appendix A at A20 (emphasis added).

that states do have rights, the California Supreme Court declined to identify its authority for this asserted right, perhaps because there is no authority for this proposition.

Third, and finally, the California Supreme Court reasons that this procedural requirement is necessary because "[f]ew local governments could afford the financial impact of a decision that a widely applicable zoning or regulatory ordinance brought about a taking of all affected property."[11] This rationale is without merit. A municipality must obey the United States Constitution irrespective of its financial condition. See Watson v. Memphis, 373 U.S. 526, 537 (1963). See also Penn Central Transportation Co. v. New York, 438 U.S. 104, 152-153 (1978) (Rehnquist, J., dissenting, citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922)). Indeed, as petitioner so astutely points out, "[i]f the harm so inflicted is economically burdensome to cities, it is a fortiori devastating to the individual victims.[12] The NAHB submits that the Fifth Amendment is clear as to upon whom should fall this economic burden.

## CONCLUSION

If the Fifth Amendment's takings clause means anything, this decision cannot stand. The procedural roadblock that the California Supreme Court has placed in the path of property owners seeking compensation pursuant to the Fifth Amendment runs contrary to the Constitution's plain

---

[11]Id.

[12]See Petition for Writ of Certiorari at 17.

meaning, as well as the totality of this Court's takings jurisprudence. Therefore, for the reasons stated above and in the Petition for Writ of Certiorari, the NAHB prays that this Court issue a writ of certiorari to review the judgment and opinion of the California Supreme Court.

Respectfully submitted,

GLEN FRANKLIN KOONTZ

1201 Fifteenth Street, N.W.
Washington, D.C. 20005
202-822-0359

Counsel for Amicus Curiae, The National Association of Home Builders

January 20, 1995